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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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11 MARVIN HARRIS,

12 Plaintiff,

13 v.

14 BRYAN D. PHILLIPS, et al.,

15 Defendants.  
16

No. 1:23-cv-1343 JLT GSA (PC)

ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS IN PART, DENYING  
PLAINTIFF LEAVE TO PROCEED *IN*  
*FORMA PAUPERIS*, AND DIRECTING  
PLAINTIFF TO PAY THE FILING FEE  
WITHIN THIRTY DAYS  
(Doc. 4)

17 Plaintiff, a state prisoner proceeding *pro se*, has filed this civil rights action seeking relief  
18 under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to  
19 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

20 On September 13, 2023, the magistrate judge found that Plaintiff is subject to the “three-  
21 strikes” bar of 28 U.S.C. § 1915. (Doc. 4.) The magistrate judge identified four of Plaintiff’s  
22 lawsuits that the Court dismissed “on the grounds that they were frivolous or failed to state a  
23 claim upon which relief may be granted.” (*Id.* at 4.) The magistrate judge found also that  
24 Plaintiff did not allege facts supporting a conclusion that he “faced imminent danger of serious  
25 physical injury at the time of filing.” (*Id.* at 5, internal quotation marks and citation omitted.)  
26 Because the claims alleged did not meet the “imminent danger” exception provided under Section  
27 1915(g), the magistrate judge recommended Plaintiff be denied leave to proceed *in forma*  
28 *pauperis* and the action “be dismissed without prejudice to refile this case with the appropriate

1 filing fee in full.” (*Id.* at 5.) In the alternative, the magistrate judge recommended that the Court  
 2 “afford the Plaintiff an opportunity to pay the filing fee and direct the Clerk to automatically  
 3 dismiss the case if Plaintiff fails to pay the filing fee in the time provided.” (*Id.* at 5-6.) Plaintiff  
 4 objects and maintains that he should not have to pay the filing fee, because “if an inmate is  
 5 without funds at the time” the case is filed, he should not be charged the filing fee. (Doc. 5 at 1.)

6 “[P]ermission to proceed *in forma pauperis* is itself a matter of privilege and not a right.”  
 7 *Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984) (citing *Weller v. Dickson*, 314 F.2d 598,  
 8 600 (9th Cir. 1963).) A prisoner does not have right to proceed without payment of fees simply  
 9 because he lacks funds. Rather, as provided under Section 1915, once a prisoner has accumulated  
 10 three strikes, he is prohibited by Section 1915(g) from pursuing any other IFP action in federal  
 11 court unless he can show he is facing “imminent danger of serious physical injury.” *See* 28 U.S.C.  
 12 § 1915(g); *Andrews v. Cervantes*, 493 F.3d 1047, 1051-52 (9th Cir. 2007). The Court has broad  
 13 discretion to grant or deny a motion to proceed IFP. *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th  
 14 Cir. 1990); *Weller*, 314 F.2d at 600-01. Plaintiff has not disputed the finding of the magistrate  
 15 judge that he is subject to the three strikes bar or shown the “imminent danger” exception may be  
 16 applied.

17 According to 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this Court conducted a *de*  
 18 *novo* review of this case. Having carefully reviewed the matter—including Plaintiff’s  
 19 objections—the Court concludes the magistrate judge’s findings are supported by the record and  
 20 by proper analysis and adopts the recommendation that Plaintiff permission to proceed *in forma*  
 21 *pauperis* be denied. However, the Court will grant Plaintiff the opportunity to pay the filing fee,  
 22 rather than dismiss the action at this juncture. Plaintiff’s failure to pay the filing fee will result in  
 23 the Court issue an order directing dismissal of the action. Accordingly, the Court **ORDERS**:

- 24 1. The Findings and Recommendations issued on September 13, 2023 (Doc. 4), are  
 25 **ADOPTED** in part.
- 26 2. Plaintiff is **DENIED** leave to proceed *in forma pauperis* in this action.
- 27 3. **Within thirty days** of the date of service of this order, Plaintiff **SHALL** pay the  
 28 \$402.00 filing fee in full.

- 1           4. **Plaintiff is advised the failure to comply with this order will result in the**  
2               **dismissal of this action.**

3  
4 IT IS SO ORDERED.

5       Dated: **October 6, 2023**

  
UNITED STATES DISTRICT JUDGE